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21 UNITED STATES DISTRICT COURT
22 SOUTHERN DISTRICT OF CALIFORNIA

23 CARRIE COUSER,
24 Plaintiff,
25 v.
26 PRE-PAID LEGAL SERVICES,
27 INC. d/b/a LEGAL SHIELD, *et al.*,
28 Defendants.

Case No. 3:12- CV-2575 LAB (WVG)

Assigned to Hon. Larry A. Burns

**REPLY IN SUPPORT OF
CALLFIRE, INC.'S MOTION TO
DISMISS FIRST AMENDED CLASS
ACTION COMPLAINT FOR
DAMAGES**

Date: September 30 2013
Time: 11:30 a.m.
Courtroom: 14A

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Defendant CallFire, Inc. (“CallFire”), through counsel and pursuant to Fed. R. Civ. P. 12(b)(6), Local Civil Rule 7.1 and the doctrine of primary jurisdiction, respectfully files this Reply in Support of its Motion to Dismiss the First Amended Class Action Complaint for Damages (ECF No. 28).

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

CallFire demonstrated that Plaintiff’s Amended Complaint (ECF No. 25) should be dismissed as to CallFire because Plaintiff’s allegations concerning CallFire fail to plausibly state a claim that CallFire made any calls to Plaintiff, let alone made calls in violation of the Telephone Consumer Protection Act (“TCPA”). Mem.¹ at 5-10. The only allegations Plaintiff lodged specifically as to CallFire are that CallFire:

- Provides voice and text **connectivity** to over 100,000 businesses (Am. Compl. ¶ 16 (emphasis added)); and
- Is a company that advertises and **engages in text messaging** through the use of automated dialers and prerecorded messages, and was an agent of Legal Shield and Frick at all relevant times. Am. Compl. ¶ 18 (emphasis added).

CallFire established that its passive provision of “connectivity” alleged by Plaintiff is exactly the function that common carriers and fax broadcasters provide, and such entities are exempt from TCPA liability when they “merely provid[e] the network over which a subscriber” sends its messages. Mem. at 8-9 (citing *In the Matter of Rules and Regulations Implementing the TCPA of 1991*, 7 FCC Rcd. 8752, 8779-80 (1992) (quoting 2 FCC Rcd. at 2820)). Neither the Federal Communications Commission (“FCC”) nor the courts have held that a passive software provider’s provision of connectivity is subject to TCPA liability simply by

¹ Memorandum of Points and Authorities in Support of Defendant CallFire, Inc.’s Motion to Dismiss First Amended Class Action Complaint for Damages (ECF No. 28-1).

1 virtue of its customers' use of its software, and thus Plaintiff fails to state a claim.
2 *Id.* at 5-10.

3 CallFire also showed that Plaintiff's allegation that CallFire "advertises and
4 engages in text messaging" is facially irrelevant to Plaintiff's case, which concerns
5 prerecorded voice calls allegedly sent to Plaintiff. *Id.* at 7 n.8. Indeed, in her
6 Opposition,² Plaintiff concedes that "this case centers on Defendant's [*sic*] *phone*
7 *calls* to Plaintiff's *cellular phone*." Opp. at 14:22-23 (emphasis in original); *see*
8 *also* Am. Compl. ¶ 26 (alleging that "at the express instruction and guidance of
9 Legal Shield, through Legal Shield's employee and representative, Frick," Plaintiff
10 received calls "using an 'artificial or prerecorded voice.'"). Thus, even taking this
11 allegation as true, Plaintiff fails to state a plausible claim that CallFire made the
12 voice calls to Plaintiff at issue in this case.

13 Alternatively, CallFire demonstrated that if the Court declines to dismiss the
14 claim against CallFire entirely, it should refer the case to the FCC under the
15 primary jurisdiction doctrine. Mem. at 11-16. As the expert agency with the
16 responsibility for implementing and enforcing the TCPA, the FCC should have an
17 opportunity in the first instance to address Plaintiff's attempt to expand liability
18 under the TCPA far beyond its intended scope to include software providers like
19 CallFire.

20 Plaintiff admits that she never alleges that CallFire had any influence on the
21 prerecorded messages that she allegedly received. *See* Opp. at 10:7-9 ("CALLFIRE
22 is correct to claim that Plaintiff did not allege" that CallFire had any "influence on
23 the prerecorded messages" allegedly received by Plaintiff). Nevertheless, through
24 her Opposition, Plaintiff attempts to rewrite her allegations to make it appear that
25 she alleged that it was CallFire itself making these calls all along, rather than her
26 scattershot approach of accusing the "Defendants" collectively, a practice which
27 fails to satisfy the requirements of Rule 8. Mem. at 5 (citing Fed. R. Civ. P.

28 ² Plaintiff's Opposition to Defendant CallFire's, Inc.'s Motion to Dismiss Amended Complaint (ECF No. 34).

8(a)(2)). The Court, however, should disregard Plaintiff's revisionist reading of her already Amended Complaint. *See Broam v. Bogan*, 320 F.3d 1023, 1034 (9th Cir. 2003) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers").

Further, Plaintiff asserts throughout her Opposition that CallFire impermissibly contradicts her allegations against CallFire, without ever detailing exactly how CallFire explaining its provision of connectivity contradicts her threadbare allegations. Instead, CallFire properly included material with its Motion so that the Court can consider whether CallFire's provision of connectivity can violate the TCPA (it cannot), and to provide the necessary context for CallFire's alternative request to refer the issues relating to CallFire to the FCC. Thus, even if the Court were to consider Plaintiff's revisionist reading of her Amended Complaint and the inapposite legal authority relied upon by Plaintiff, for the reasons discussed below, Plaintiff fails to demonstrate that her claims should not be dismissed, or alternatively, that this case should not be referred to the FCC.

II. REQUIRING PLAINTIFF TO PUT CALLFIRE ON NOTICE OF THE ALLEGATIONS SPECIFIC TO CALLFIRE IS NOT A HEIGHTENED PLEADING STANDARD

CallFire demonstrated that the only relevant³ allegation directed against the service that CallFire provides – its provision of "connectivity" through its self-service and web-based software platform – is insufficient to establish that CallFire "makes" any calls in violation of the TCPA. Mem. at 5-6. CallFire further established that Plaintiff's practice of lumping all of the Defendants together fails to satisfy Plaintiff's obligation to put CallFire on notice as to exactly what CallFire is alleged to have done that gave rise to Plaintiff's claims. *Id.* at 5-6.

³ Again, Plaintiff's allegation that CallFire "engages in text messaging through the use of automated dialers and prerecorded messages," Am. Compl. ¶ 18, is entirely irrelevant to this action because Plaintiff alleges she received prerecorded voice calls, not prerecorded text messages.

1 Plaintiff argues that CallFire seeks to impose a heightened pleading standard
 2 on Plaintiff, but that in any event, she “sufficiently identifies CALLFIRE as a party
 3 who made automated and prerecorded calls to Plaintiff.” Opp. at 9. Plaintiff’s
 4 allegation, however, is that “at the *express instruction and guidance of Legal*
 5 *Shield, through* Legal Shield’s employee and representative, *Frick, Defendants*
 6 began contacting Plaintiff” and CallFire’s provision of “connectivity” enabled this
 7 to happen. Am. Compl. ¶ 16, 26 (emphasis added). The only plausible reading of
 8 Plaintiff’s Amended Complaint is that Defendant Legal Shield gave express
 9 instructions to its employee and representative, Defendant Frick, to make calls to
 10 Plaintiff, and that Defendant Frick made these calls on behalf of Defendant Legal
 11 Shield using the connectivity that CallFire’s software platform enables. As CallFire
 12 has already established, the TCPA does not impose liability on an entity simply
 13 because it provides a connection to the public switched telephone network. Mem.
 14 at 6-7. If that were the case, Plaintiff’s wireless carrier would be equally liable to
 15 Plaintiff for delivering the calls at issue to her.⁴

16 Nowhere in her Amended Complaint does Plaintiff even intimate that
 17 CallFire itself initiated any calls to Plaintiff, which she concedes is a necessary
 18 element of her claims. Opp. at 2:20-28 (citing 47 U.S.C. § 227(b)(1)(A)(iii)).
 19 Indeed, Plaintiff admits that she never alleges that CallFire had any influence on the
 20 prerecorded messages that she allegedly received. See Opp. at 10:7-9. It is
 21 therefore absurd for Plaintiff to assert that “because the FAC refers to each
 22 defendant as a whole (i.e., ‘Defendants’)” CallFire is incorrect that “the FAC
 23 simply lumps ‘all of the defendants together.’” *Id.* at 10:1-2. Lodging allegations

24
 25 ⁴ Plaintiff argues that because “CALLFIRE’s business is allegedly one that offers greater
 26 connectivity between businesses and consumers, the reasonable inference is that CALLFIRE
 27 made the alleged calls.” Opp. at 6:24-26. Plaintiff’s wireless provider also offers greater
 28 connectivity between businesses and consumers, and it would be equally as unreasonable to infer
 that CallFire or Plaintiff’s wireless carrier made the calls at issue here. Providing a connection in
 no way implies initiating content through such connection. Plaintiff’s argument is comparable to
 stating that because road construction crews provide a connection between point A and point B,
 they can be liable if someone commits a traffic offense on the roads they constructed.

1 against the “Defendants” collectively necessarily “lumps ‘all of the defendants
2 together.’”

3 Plaintiff’s suggestion that lumping defendants together is only impermissible
4 in the context of claims involving state action or arising under “42 U.S.C. 1981,
5 1983, or RICO” is also false. *Id.* at 9:20-23. The requirements of Rule 8 “to
6 provide a short and plain statement of the claim” as it applies to each defendant
7 pertains to all claims and complaints. Fed. R. Civ. P. 8(a)(2). Indeed, CallFire
8 relied upon *Garcia v. Seterus, Inc.*, CIV No. 12-2049-LJO-SAB, 2013 WL
9 1281565 (E.D. Cal. Mar. 27, 2013), which concerned a foreclosure action and a
10 claim to quiet title, and not a claim involving state action that Plaintiff asserts
11 requires a heightened pleadings standard. *Id.* at *2. There the court dismissed the
12 complaint because it “lumps defendants and others together and fails to distinguish
13 adequately claims and alleged wrongs among defendants.” *Id.* at *5. Plaintiff’s
14 complaint here makes the same fatal mistake.

15 Similarly, in another foreclosure action, the court dismissed the complaint
16 because a **“plaintiff may not collectively accuse multiple defendants of**
17 **committing misdeeds through the expedience of the title ‘Defendants.’ Such**
18 **group pleading is not allowed.”** *Riehle v. Bank of America, N.A.*, CIV No. 13-
19 251-PHX-NVW, 2013 WL 1694442, at *2 (D. Ariz. Apr. 18, 2013) (emphasis
20 added); *see also Petrovic v. Princess Cruise Lines, LTD.*, CIV No. 12-21588, 2012
21 WL 3026368, *3 (S.D. Fla. July 20, 2012) (dismissing negligence action because
22 **“a complaint that lumps all the defendants together in each claim and provides**
23 **no factual basis to distinguish their conduct fails to satisfy Rule 8.”**) (citation
24 and internal quotations omitted) (emphasis added); *All American Semiconductor,*
25 *Inc. v. Peoplesoft, USA, Inc.*, CIV No. 07-12963-BKC-LMI, 2010 WL 2854153, *
26 at 10 (S.D. Fla. July 20, 2010) (dismissing bankruptcy action because of the
27 “undifferentiated allegations that lump all the defendants together.”); *Beyard v.*
28 *Caddo Parish Comm’n*, CIV No. 06-2296, 2007 WL 1741970, at *4 (W.D. La.

1 Apr. 27, 2007) (“Plaintiff’s conclusory and generic allegations that lump all
2 defendants in one group are insufficient”).

3 CallFire is therefore not seeking to impose a heightened pleading standard on
4 Plaintiff, but simply asking the Court to enforce the standards of pleading as they
5 currently exist. This case has been pending for nearly a year and Plaintiff has
6 already conducted discovery against Legal Shield. *See* ECF No. 21-1 at 3 (“In light
7 of recent discovery responses, Plaintiff has determined that the operative Complaint
8 in this case needs to be modified”). The only relevant modifications Plaintiff made
9 to her Complaint, however, involved making “Defendant” plural and to add
10 CallFire to the case because it allegedly “provides voice and text connectivity to
11 over 100,000 businesses.” Am. Compl. ¶ 16.

12 Plaintiff, however, has accused all of the Defendants of negligently sending
13 telephone calls to Plaintiff, and in the alternative, of willfully violating the TCPA.
14 CallFire, and the Court, should not have to guess what specific actions CallFire
15 allegedly took that were negligent or willful. It is Plaintiff’s obligation to provide
16 such notice to CallFire and the Court.⁵ Because Plaintiff fails to allege any facts
17 related to CallFire that would give rise to a TCPA violation as against CallFire, and
18 because Plaintiff indiscriminately lumps all of the Defendants together, the
19 Amended Complaint should be dismissed.

20 **III. CALLFIRE’S TERMS OF SERVICE ARE PROPERLY BEFORE THE** 21 **COURT**

22 Plaintiff argues that after putting CallFire’s relationship with the other
23 Defendants and its service in general at issue, she should be able to hide behind her
24 insufficient allegations and the Court should refuse to consider CallFire’s Terms of
25

26
27 ⁵ CallFire believes that the only allegation Plaintiff could lodge against CallFire on an individual
28 basis, and within the bounds of Rule 11, is that CallFire’s self-service software platform does
provide connectivity to the telephone network. Amendment of Plaintiff’s already Amended
Complaint would therefore be futile for the reasons CallFire has already articulated. Mem. 5-10.
The Court should therefore dismiss CallFire from this case with prejudice.

1 Service and the declaration summarizing and authenticating the same. Opp. at
2 13:3-15. Plaintiff's argument fails for three reasons.

3 First, Plaintiff alleges that CallFire is the agent⁶ of the other Defendants by
4 virtue of their alleged use of CallFire's provision of connectivity, Am. Compl. ¶¶
5 16, 18, and thus Plaintiff herself put CallFire's Terms of Service at issue. As
6 explained in the Declaration of Jagannathan Thinakaran in Support of Motion to
7 Dismiss (ECF No. 28-2), "[e]very customer that utilizes CallFire's software
8 platform to send voice broadcasts is required to agree to CallFire's Terms of
9 Service before initiating any voice broadcasts." Thinakaran Decl. ¶ 7. Thus,
10 CallFire's authenticated Terms of Service expressly govern the relationship
11 between CallFire and all of its customers when they use CallFire's software
12 platform, including the alleged use by the other Defendants. CallFire's Terms of
13 Service are therefore necessarily relevant to this action, and notably Plaintiff does
14 not, because she cannot, dispute the authenticity of CallFire's Terms of Service.
15 CallFire's Terms of Service are therefore "'integral' to the complaint, and [the
16 Court] can consider [their] terms in deciding" CallFire's Motion to Dismiss
17 "without converting the proceeding to one for summary judgment." *Int'l Audiotext*
18 *Network, Inc. AT&T*, 62 F.3d 69, 72 (2d Cir. 1995).

19
20
21 ⁶ Plaintiff's argument that the FCC's *Dish Network Order* "actually supports Plaintiff's
22 allegations of vicarious liability on the part of Defendant CALLFIRE" completely misreads this
23 decision (and hornbook law). Opp. at 15:3-18. There the FCC held that the *seller* on whose
24 behalf calls are made can be directly liable under the TCPA if it provides "comprehensive
25 instructions as to the timing and the manner of the call," or the *seller* can be vicariously liable for
26 its agent's acts under traditional common law agency principles. *Dish Network Order*, ¶¶ 27, 34.
27 Here, Plaintiff does not, because she cannot, allege that CallFire was the seller on whose behalf
28 calls were being made. Instead, she alleges that Defendant Legal Shield provided "**express
instruction and guidance**" to Defendant Frick to make the calls at issue. Am. Compl. ¶ 16.
Taking Plaintiff's allegations as true, Defendant Legal Shield would be directly liable for any
TCPA violations because it was the principal expressly directing its agent Frick to make these
calls through CallFire's software platform. Plaintiff's "respondeat inferior" theory of liability
turns vicarious liability on its head by apparently arguing that a principal's agent's agent can be
vicariously liable for following the express instructions of the principal. See Restatement (Third)
of Agency § 7.01 cmt d (explaining that "there is no principal [*sic*] of 'respondeat inferior'").

1 Second, CallFire's Terms of Service is publicly available, Mem. at 2 n.3, and
2 the Court can take judicial notice of a company's publicly available Terms of
3 Service. *See In re Google, Inc. Privacy Policy Litigation*, CIV No. 12-01382-PSG,
4 2012 WL 6738343, at *4 (N.D. Cal. Dec. 28, 2012) (taking judicial notice of
5 Google's Terms of Service and ruling that a district court can consider such terms
6 "if the contract's authenticity is not contested and the complaint necessarily relies
7 on that contract."); *see also In re Sony Gaming Networks and Customer Data*
8 *Security Breach Litigation*, 903 F. Supp. 2d 942, 954 (S.D. Cal. 2012) (taking
9 judicial notice of Sony's publicly available terms of service because their
10 authenticity was not questioned and they were relevant to the case).

11 Further, the Court "need not accept as true allegations that contradict matters
12 that are ... subject to judicial notice." *In re Google*, 2012 WL 6738343, at *3. In
13 any event, contrary to Plaintiff's conclusory assertions, CallFire's Terms of Service
14 do not contradict any allegations contained in the Amended Complaint lodged
15 against CallFire. *See, e.g.,* Opp. at 16:3-14. As stated above, the only relevant
16 allegation against CallFire is that its service provides "connectivity," and CallFire's
17 Terms of Service simply explain how and under what conditions that connectivity
18 is provided through CallFire's software platform. Indeed, Plaintiff cannot
19 simultaneously admit that she never alleged that CallFire "provided a list of
20 telephone numbers, the content of the prerecorded messages, or any other influence
21 on the prerecorded messages allegedly sent by the other Defendants," Mem. at
22 7:20-8:2; Opp. at 5-9, but then assert that CallFire's Terms of Service somehow
23 contradict her allegations. Plaintiff's argument to the contrary is pure makeweight.

24 Finally, CallFire's alternative request to have the issues related to CallFire
25 referred to the FCC was made pursuant to the primary jurisdiction doctrine, and not
26 Rule 12(b)(6). There is no prohibition against including additional material not
27 explicitly referenced in a complaint to provide context for the Court to properly
28 consider a motion for primary jurisdiction referral, and Plaintiff certainly cites no

1 case law holding otherwise.

2 Accordingly, the Court can consider CallFire's Terms of Service and the
3 declaration summarizing and authenticating the same because (1) Plaintiff herself
4 put at issue the terms and conditions under which CallFire provides connectivity
5 through its software platform; (2) CallFire's Terms of Service are susceptible to
6 judicial notice; or (3) they are relevant to the Court's consideration of CallFire's
7 alternative request for a primary jurisdiction referral.

8 **IV. IF THE COURT DECLINES TO DISMISS THE AMENDED**
9 **COMPLAINT, THE COURT SHOULD REFER THE MATTER TO**
10 **THE FCC**

11 If the Court declines to dismiss Plaintiff's Amended Complaint as against
12 CallFire, CallFire demonstrated that the Court should refer this matter to the FCC
13 because it satisfies the requirements to invoke the primary jurisdiction doctrine:
14 "(1) the need to resolve an issue that (2) has been placed by Congress within the
15 jurisdiction of an administrative body having regulatory authority (3) pursuant to a
16 statute that subjects an industry or activity to a comprehensive regulatory authority
17 that (4) requires expertise or uniformity in administration." Mem. at 11-16 (citing
18 *Syntek Semiconductor Co., Ltd. V. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th
19 Cir. 2002)).

20 Plaintiff erroneously argues that any ruling by the FCC issued pursuant to
21 the Court's referral of the issues related to CallFire could only be applied
22 prospectively. Opp. at 17:4-9. Plaintiff makes this argument by misleading the
23 Court as to the nature of FCC's *2012 TCPA Order*,⁷ asserting that it was a
24 declaratory ruling, which the FCC issues in order to terminate a controversy or to
25 remove uncertainty. See 47 C.F.R. § 1.2(a). But the *2012 TCPA Order* was a
26 Report and Order issued after a Notice of Proposed Rulemaking was released in
27 order to *change* the rules, not *interpret* existing rules. See *2012 TCPA Order*, ¶ 16.

28 ⁷ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830 ("2012 TCPA Order")

1 Although Plaintiff is correct that the FCC's regulations will require "prior express
 2 written consent," as defined by the FCC, for certain types of autodialed or
 3 prerecorded messages beginning on October 16, 2013, *Id.* ¶ 18, the prospective
 4 nature of these rules was a function of the rules being *new*.⁸

5 Plaintiff thus misconstrues the basis of CallFire's request for a primary
 6 jurisdiction referral. CallFire would not ask the FCC to create a new exemption for
 7 intermediate software providers to apply prospectively. Rather, consistent with
 8 Congressional intent and the FCC's prior decisions, CallFire would seek a
 9 determination that it does not "make" calls under existing law simply by virtue of
 10 providing connectivity through its software. Despite the seemingly plain language
 11 of the TCPA, a primary jurisdiction referral is entirely appropriate. *See Sancom,*
 12 *Inc. v. AT&T Corp.*, 696 F. Supp. 2d 1030, 1037-38 (D.S.D. 2010) (referring issues
 13 to FCC to obtain expert guidance on terms such as "customer" and "subscribe"
 14 found in telephone company's tariff and the Communications Act).

15 Here, the FCC indisputably has jurisdiction and expertise over the TCPA and
 16 was tasked by Congress to implement and enforce uniform, nationwide regulations.
 17 *See, e.g., Report and Order, In the Matter of Rules and Regulations Implementing*
 18 *the Telephone Consumer Protection Act (TCPA) of 1991*, Docket No. 02-278, FCC
 19 03-153, ¶ 83 (June 26, 2003) ("we believe that it was the clear intent of Congress
 20 generally to promote a uniform regulatory scheme under which telemarketers
 21 would not be subject to multiple, conflicting regulations."). But through her
 22 Amended Complaint, Plaintiff is asking the Court to apply a novel application of
 23 the TCPA and expand liability beyond anything that the FCC has currently
 24 addressed.

25 By analogy, under Plaintiff's legal theory, a company such as Microsoft
 26 could be liable for CAN-SPAM Act violations simply because its customers could
 27 use its Outlook software to send spam. CallFire is aware of no decision, and

28 ⁸ The FCC could not, consistent with the Administrative Procedure Act, do anything but
 implement a rule change prospectively.

1 Plaintiff certainly cites none, where a court found that an intermediary software
 2 provider “makes” a text message call under the TCPA when it does not control the
 3 content, timing, or direction of the messages its customers send, just as Microsoft
 4 cannot be deemed to be “sending” Outlook users’ emails.

5 Indeed, Plaintiff completely ignores the similarity of the only TCPA decision
 6 involving a software provider *qua* software provider’s liability under the TCPA.
 7 *See Glauser v. Twilio, Inc.*, CIV No. 11-2584 PJH, 2012 WL 259426 (N.D. Cal.
 8 Jan. 27, 2012). Of course, the court in *Twilio* found it necessary to defer to the
 9 FCC’s “recognized expertise” on the precise issue CallFire seeks to refer to the
 10 FCC here, i.e., “the applicability of any ‘common carrier’ exemption” to an
 11 intermediate software provider under the TCPA. *Id.* at *2. Plaintiff provides no
 12 grounds to reach a different result here except to say that the Court should close its
 13 eyes as to how CallFire provides connectivity through its software platform. As
 14 discussed above, however, the Court can rely on CallFire’s Terms of Service, which
 15 explain how CallFire’s services operate, when considering CallFire’s alternative
 16 request for a primary jurisdiction referral.

17 Plaintiff also makes unsubstantiated allegations that she would be prejudiced
 18 by any delay that results if this case were referred to the FCC. *Opp.* at 18. The
 19 mere passage of time, however, does not suffice as a legal basis for declining to
 20 invoke the primary jurisdiction doctrine. Nor does the mere passage of time,
 21 without more, prejudice plaintiff.⁹ As the Supreme Court explained, courts are
 22 “obliged to defer” to an agency where the “issue brought before a court is in the
 23 process of litigation through procedures originating in the [agency].” *Fed. Power*
 24 *Comm’n v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *see also Hart*
 25 *v. Comcast of Alameda*, CIV No. 07-6350 PJH, 2008 WL 2610787, at *2 (N.D. Cal.

27 ⁹ *See Thomas v. McBride*, 9 F.3d 1549, 1993 WL 570467, at *3 (7th Cir. Nov. 16, 1993) (noting
 28 insufficiency of petitioner’s “unsubstantiated allegations of prejudice”). Plaintiff fails to explain
 how issuing subpoenas to CallFire would be any more expensive or time consuming than issuing
 discovery requests to a party.

1 June 25, 2008) (holding the FCC had primary jurisdiction because two petitions had
2 been filed on the precise issue before the court, and the FCC announced it would
3 seek public comment).

4 The FCC is now actively considering the precise issue of whether a software
5 provider can be liable for “making” a call under the TCPA, both pursuant to the
6 Club Texting Petition previously detailed by CallFire, Mem. at 13-15, and the
7 recent *Twilio* referral. Plaintiff submits no compelling reason why the Court should
8 waste its own resources deciding an issue within the FCC’s area of expertise and
9 which it is currently addressing, simply to risk issuing a conflicting ruling on a
10 statute that requires “uniform interpretation.” *Boyes*, 199 F.3d at 1265.

11 Accordingly, to the extent the Court does not dismiss the claims against CallFire
12 pursuant to Rule 12(b)(6), the Court should refer the matter to the FCC.

13 **V. CONCLUSION**

14 For the foregoing reasons, CallFire respectfully requests this Court to grant
15 its motion to dismiss the claims alleged against CallFire in Plaintiff’s Amended
16 Complaint with prejudice. In the alternative, the Court should stay the entire case
17 or dismiss the claims against CallFire without prejudice and refer the issues related
18 to CallFire to the FCC.

19
20 Dated: September 23, 2013

Respectfully submitted,

ARENT FOX LLP

21
22
23 By: /s/ Michael L. Turrill
24 MICHAEL L. TURRILL
25 PAUL A. RIGALI
26 Attorneys for Defendant
27 CALLFIRE, INC.
28

COUSER v. PRE-PAID LEGAL SERVICES, INC., et al.
USDC, Southern District of California Case No. 12 CV 2575 LAB (WVG)

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is Arent Fox LLP, 555 West Fifth Street, 48th Floor, Los Angeles, California 90013-1065. I am employed in the County of Los Angeles, where this service occurs. I am over the age of 18 years, and not a party to the within cause.

On the date set forth below, according to ordinary business practice, I served the foregoing document(s) described as:

**“REPLY IN SUPPORT OF CALLFIRE, INC.’S MOTION TO DISMISS
FIRST AMENDED CLASS ACTION COMPLAINT FOR DAMAGES”**

- ☒ (BY CM/ECF) I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants (if any) indicated on the Manual Notice list.
- ☐ (BY FAX) I transmitted via facsimile, from facsimile number 213.629.7401, the document(s) to the person(s) on the attached service list at the fax number(s) set forth therein, on this date before 5:00 p.m. A statement that this transmission was reported as complete and properly issued by the sending fax machine without error is attached to this Proof of Service.
- ☐ (BY E-MAIL) On this date, I personally transmitted the foregoing document(s) via electronic mail to the e-mail address(es) of the person(s) on the attached service list.
- ☐ (BY MAIL) I am readily familiar with my employer’s business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business. On this date, I placed the document(s) in envelopes addressed to the person(s) on the attached service list and sealed and placed the envelopes for collection and mailing following ordinary business practices.
- ☐ (BY PERSONAL SERVICE) On this date, I delivered by hand envelope(s) containing the document(s) to the persons(s) on the attached service list.
- ☐ (BY OVERNIGHT DELIVERY) On this date, I placed the documents in envelope(s) addressed to the person(s) on the attached service list, and caused those envelopes to be delivered to an overnight delivery carrier, with delivery fees provided for, for next-business-day delivery to whom it is to be served.

1
2 ☒ (Federal) I declare under penalty of perjury under the laws of the
3 United States of America that the foregoing is true and correct.

4 Executed on September 23, 2013 at Los Angeles, California.

5 
6 Susan Baca

COUSER v. PRE-PAID LEGAL SERVICES, INC., et al.
USDC, Southern District of California Case No. 12 CV 2575 LAB (WVG)

SERVICE LIST

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